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Human Rights Council
Working Group on Arbitrary Detention

Opinions adopted by the Working Group on Arbitrary Detention at its eighty-first session, 17–26 April 2018

Opinion No. 23/2018 concerning Gustave Bagayamukwe Tadji (Democratic Republic of the Congo)

1. The Working Group on Arbitrary Detention was established in resolution 1991/42 of the Commission on Human Rights, which extended and clarified the Working Group's mandate in its resolution 1997/50. Pursuant to General Assembly resolution 60/251 and Human Rights Council decision 1/102, the Council assumed the mandate of the Commission. The Council most recently extended the mandate of the Working Group for a three-year period in its resolution 33/30.

2. In accordance with its methods of work (A/HRC/36/38), on 1 December 2017 the Working Group transmitted to the Government of the Democratic Republic of the Congo a communication concerning Gustave Bagayamukwe Tadji. The Government has not replied to the communication. The State is a party to the International Covenant on Civil and Political Rights.

3. The Working Group regards deprivation of liberty as arbitrary in the following cases:

(a) When it is clearly impossible to invoke any legal basis justifying the deprivation of liberty (as when a person is kept in detention after the completion of his or her sentence or despite an amnesty law applicable to him or her) (category I);

(b) When the deprivation of liberty results from the exercise of the rights or freedoms guaranteed by articles 7, 13, 14, 18, 19, 20 and 21 of the Universal Declaration of Human Rights and, insofar as States parties are concerned, by articles 12, 18, 19, 21, 22, 25, 26 and 27 of the Covenant (category II);

(c) When the total or partial non-observance of the international norms relating to the right to a fair trial, established in the Universal Declaration of Human Rights and in the relevant international instruments accepted by the States concerned, is of such gravity as to give the deprivation of liberty an arbitrary character (category III);

(d) When asylum seekers, immigrants or refugees are subjected to prolonged administrative custody without the possibility of administrative or judicial review or remedy (category IV);

(e) When the deprivation of liberty constitutes a violation of international law on the grounds of discrimination based on birth, national, ethnic or social origin, language, religion, economic condition, political or other opinion, gender, sexual orientation, disability, or any other status, that aims towards or can result in ignoring the equality of human beings (category V).

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Submissions

Communication from the source

4. Gustave Bagayamukwe Tadji, born in 1954, is a Congolese national. He normally resides in Bukavu, South Kivu.

5. According to the source, Mr. Bagayamukwe Tadji was an industrial electronics and aeronautic telecommunications engineer. He worked for 20 years for the Central Bank of Congo. On 31 December 2010, the President of the Republic dismissed him. The source contends that the cause of the dismissal was a campaign for intercommunal peace and reconciliation that Mr. Bagayamukwe Tadji led in August 2010. Mr. Bagayamukwe Tadji was also the national president of a non-governmental organization (NGO), the Association for the Defence of the Interests of Kivu-Bukavu (Association pour la défense des intérêts du Kivu-Bukavu), and the president of the coordination committee and the interim high council of the Union of Revolutionary Forces of the Congo (Union des forces révolutionnaires du Congo). Mr. Bagayamukwe Tadji advocated for the creation of a new, decent State and nation in the Democratic Republic of the Congo.

6. According to the source, the Association, with the approval of the provincial governor and the leaders of the tribal and ethnic mutual aid associations of South Kivu, had decided to eliminate armed groups in South Kivu. To this end, it had set up "people's self-defence forces" to compensate for the shortcomings of the country's security forces, whether the army or the police, in non-urban areas. However, the source submits that the governor then ordered the arrest of the movement's leaders, whom he considered to be rebels. In response, the leaders, once back in their respective provinces, formed the Union of Revolutionary Forces and designated Mr. Bagayamukwe Tadji as its president.

7. According to the source, Mr. Bagayamukwe Tadji was arrested on 10 February 2013 at 5.30 a.m. for allegedly committing a political offence, but he was not shown a warrant. The arrest did not take place at his home but at a cousin's. He was then taken by presidential jet to Kinshasa. The source submits that Mr. Bagayamukwe Tadji was blindfolded and his hands and feet tied and that a weapon was trained on him. He was subjected to threats during the journey, then stripped and thrown naked into a dungeon. It was not until a week later that he learned that he was in Kinshasa. The arrest order had been issued by the governor of the Province of South Kivu. Mr. Bagayamukwe Tadji has been detained ever since. A week after his arrest, Mr. Bagayamukwe Tadji's cousin was also arrested.

8. According to the source, Mr. Bagayamukwe Tadji is being held by order of the governor of South Kivu, the general manager of the National Intelligence Agency and the President of the Republic.

9. Between 10 February and 23 May 2013, Mr. Bagayamukwe Tadji was held in a cell on the premises of the National Intelligence Agency. On 23 May 2013, Mr. Bagayamukwe Tadji was transferred to Ndolo military prison in Kinshasa. He is currently being held at the military hospital on Kokolo base in Kinshasa.

10. The source indicates that, on 23 May 2013, Mr. Bagayamukwe Tadji learned from the military and civil authorities that he was being held for leading an insurrection movement in collusion with the M23 armed group. He also learned that the military justice system had initiated legal proceedings against him to prevent "participation in an insurrection movement" under articles 136 and 137 of the Ordinary Criminal Code, which criminalize the establishment of an armed coalition whose aim is to destabilize State institutions and take power by force.

11. More specifically, according to the interlocutory decision of 11 August 2016 of the military court of Kinshasa-Gombe garrison, Mr. Bagayamukwe Tadji was being prosecuted for "taking part in collective violence likely to jeopardize the institutions of the Democratic Republic of the Congo or to undermine its territorial integrity." The decision was based on the fact that he had "between June 2012 and January 2013 [formed] an armed coalition whose goal was to destabilize the institutions of the [Democratic Republic of the Congo] and take power by force, in collusion with M23, by taking active part, on behalf of the

insurrection movement, in a meeting in Rumangabo (North Kivu), together with Mr. Nziramakenga Ruzandiza Emmanuel, also known as Sultan or Makenda, Kahasha Rurula and Albert Foca Mike of M23, as well as Ndushi Songa of the Raia Mutomboki group, to plan attacks on the cities of Bukavu and Uvira."

12. The indictment notwithstanding, Mr. Bagayamukwe Tadji was never sentenced on the merits of the case. According to the source, the investigation (reference No. RP603/013) proceeded normally until Act No. 014/006 on amnesty for acts of insurrection, acts of war and political offences was promulgated on 11 February 2014. On 15 February 2014, the public prosecutor's office requested the acquittal of the defendants, including Mr. Bagayamukwe Tadji. The judge reserved judgment. On two different occasions, Mr. Bagayamukwe Tadji made the pledge that is a prerequisite for the granting of amnesty. However, amnesty was denied and no judgment was issued. Mr. Bagayamukwe Tadji's four co-defendants, on the other hand, were amnestied under the Act and were released on 30 April 2014.

13. In addition, the source claims that Mr. Bagayamukwe Tadji is a civilian and that a military court is therefore incompetent *ratione personae* to try his case. There was no legal basis for his referral to this court.

14. According to the source, on 23 May 2016, Mr. Bagayamukwe Tadji was diagnosed with cancer that cannot be treated in the Democratic Republic of the Congo. He has been hospitalized ever since. His doctors are of the view that he needs to undergo treatment abroad, but the Government has not authorized him to make the trip on humanitarian grounds.

Deprivation of liberty under category I

15. The source indicates that Mr. Bagayamukwe Tadji has never been tried or convicted for the acts of which he stands accused as the proceedings were interrupted by the enactment of the aforementioned law on amnesty, for which, according to the source, Mr. Bagayamukwe Tadji was eligible. Mr. Bagayamukwe Tadji requested that the law be applied to his case, but all his requests were dismissed despite the fact that he has not been convicted on the merits.

Deprivation of liberty under category II

16. According to the source, the reasons behind Mr. Bagayamukwe Tadji's arrest and detention are his membership in and activities in connection with various associations. Thus, his arrest is due to his exercising his right to freedom of association, of assembly, of opinion and of expression as enshrined in articles 19 and 20 of the Universal Declaration of Human Rights and articles 19 and 21 of the Covenant.

Deprivation of liberty under category III

17. According to the source, although Mr. Bagayamukwe Tadji was charged with offences provided for in domestic legislation, he was unable to exercise his right to a defence or receive a fair trial. Indeed, it was not until three months after his arrest, i.e. on 25 May 2013, that he was allowed to meet with a lawyer and relatives.

18. Furthermore, between 10 February and 23 May 2013, Mr. Bagayamukwe Tadji was held with no legal basis and without being formally charged. Moreover, as mentioned above, Mr. Bagayamukwe Tadji should not have been referred to a military court given his status as a civilian.

Response from the Government

19. On 1 December 2017, the Working Group transmitted the source's claims to the Government under its regular communication procedure. It requested the Government to provide its response no later than 30 January 2018. To date, the Government has neither replied nor requested an extension of the deadline, as permitted under the Working Group's methods of work.

Discussion

20. In the absence of a response from the Government, the Working Group has decided to render the present opinion, in conformity with paragraph 15 of its methods of work.

21. The Working Group has in its jurisprudence established the ways in which it deals with evidentiary issues. If the source has established a prima facie case for breach of international requirements constituting arbitrary detention, the burden of proof should be understood to rest upon the Government if it wishes to refute the allegations (see A/HRC/19/57, para. 68). In the present case, the Government has chosen not to challenge the prima facie credible allegations made by the source.

22. In the light of all the information received, the Working Group considers that the source has made credible prima facie allegations that can be summarized as follows: Mr. Bagayamukwe Tadji was president of the Union of Revolutionary Forces of the Congo, a group that opposed the Government. Mr. Bagayamukwe Tadji was arrested and detained by the Government and placed under the authority of the National Intelligence Agency on 10 February 2013. Proceedings were under way against him before a military court for "participation in an insurrection movement" until the promulgation, on 11 February 2014, of a law on amnesty, of which Mr. Bagayamukwe Tadji should have been able to avail himself. However, despite making the pledge required under article 5 of the amnesty law, he remains detained at the military prison in Kinshasa although his health is deteriorating and requires treatment that is not available in the Democratic Republic of the Congo.

Violations under category I

23. The Working Group notes that Mr. Bagayamukwe Tadji was arrested on 10 February 2013 and was held without being shown an arrest warrant. On 23 May 2013, in other words over three months after his arrest, he learned from the authorities that he was being detained for allegedly leading an insurrection movement in collusion with the M23 armed group. During this period, Mr. Bagayamukwe Tadji was held in a solitary confinement and, consequently, did not have access to a judge. Therefore, the Working Group believes that it has been established that the Democratic Republic of the Congo violated rights enshrined in article 9 of the Covenant and recalled in principles 2 and 36 of General Assembly resolution 43/173.

24. Consequently, the Working Group finds that Mr. Bagayamukwe Tadji was detained without legal basis for this period and that his arrest and ensuing detention fall under category I.

25. The Working Group also notes that Mr. Bagayamukwe Tadji was arrested and transported blindfolded, with his hands tied and, reportedly, with a weapon constantly trained on him and was then stripped naked and put in a cell on the premises of the National Intelligence Agency. He remained in isolation for over three months without contact with his family or defence counsel. His treatment as described, especially his extended solitary confinement, would constitute inhuman and degrading treatment and violates article 5 of the Universal Declaration of Human Rights, articles 7 and 10 of the Covenant, articles 1 and 4 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment,[1] article 5 of the African Charter on Human and Peoples' Rights,[2] and principles 6 and 21 of the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment adopted by the General Assembly in resolution 43/173. Without ruling on the source's claims of degrading treatment, the Working Group is of the view that the claims should be transmitted to the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment in accordance with paragraph 33 (a) of its methods of work.

[1] The Democratic Republic of the Congo ratified the Convention against Torture on 18 March 1996.

[2] The Democratic Republic of the Congo ratified the African Charter on 20 July 1987.

Violations under category II

26. The Working Group notes that Mr. Bagayamukwe Tadji was the national president of the NGO Association for the Defence of the Interests of Kivu-Bukavu, whose aim was to eliminate armed groups in South Kivu by establishing people's self-defence forces to compensate for the gaps in army and police services. The members of the Association were declared rebels and arrested by the Congolese authorities. On their return, they founded the Union of Revolutionary Forces of the Congo, of which Mr. Bagayamukwe Tadji was appointed president. The Union opposes the Government's policies. Mr. Bagayamukwe Tadji has expressed his desire to reform the Democratic Republic of the Congo.

27. The source submits that Mr. Bagayamukwe Tadji is a civil society activist. In the absence of a reply from the Government, the Working Group deems the source's claims to be credible. However, on this specific point, based on the information available in the public domain, i.e. local and international press and various studies, it is not always clearly established that the organizations led by Mr. Bagayamukwe Tadji were exclusively civilian in nature. In the Democratic Republic of the Congo, there has been a proliferation of armed movements in response to the failing State such that it has become tricky to distinguish between purely civilian, military and paramilitary movements. In fact, the source even states that one of the organizations to which Mr. Bagayamukwe Tadji belonged had begun a self-defence programme, which proves that, at that time at least, the organization had a military or paramilitary dimension. Moreover, the source recalls that Mr. Bagayamukwe Tadji wished to benefit from the amnesty afforded to members of armed groups, which could constitute an indirect confession of his membership in such a group. Under these circumstances, the Working Group cannot give credence to the source's argument that Mr. Bagayamukwe Tadji was arrested and detained merely for exercising his right to freedom of expression, of opinion and of association, including with regard to political affairs. Consequently, the Working Group finds that his detention does not fall under category II.

Violations under category III

28. In addition, the Working Group notes that Mr. Bagayamukwe Tadji has been detained for five years and that his trial has not led to a judicial decision on his responsibility or guilt despite the fact that he has a right to be tried within a reasonable period in keeping with articles 9 and 14 of the Covenant and article 7 of the African Charter on Human and Peoples' Rights.

29. The Working Group finds that the source's claims raise other violations of the right to a fair trial, in particular the right to receive visits from relatives[3] and the right to access to a lawyer.[4]

30. These violations have a significant impact on the right to a fair trial. Therefore, the Working Group finds that Mr. Bagayamukwe Tadji's ongoing detention has become arbitrary and falls under category III.

Violations under category V

31. The Working Group also notes that Mr. Bagayamukwe Tadji was arrested under articles 136 and 138 of the Ordinary Criminal Code, which criminalize the establishment of an armed coalition whose aim is to destabilize State institutions and take power by force. However, the Working Group remarks that the amnesty law enacted on 11 February 2014 applies to the acts of insurrection of which Mr. Bagayamukwe Tadji stands accused. Despite having made the pledge in accordance with the formal requirements under the amnesty law, Mr. Bagayamukwe Tadji remains detained and his case has not been heard. The Working Group further notes that other members of the Union of Revolutionary Forces

[3] Rules 43, 58 and 106 of the United Nations Standard Minimum Rules for the Treatment of Prisoners (Nelson Mandela Rules) and principle 19 of the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment.

[4] See the United Nations Basic Principles and Guidelines on Remedies and Procedures on the Right of Anyone Deprived of Their Liberty to Bring Proceedings Before a Court, principles 9 and 10.

of the Congo have been released pursuant to the amnesty law. Accordingly, the Working Group finds that this differential treatment is unjustified unless the Government or the justice system provides the reasons for it.[5] In the light of the Government's silence, the Working Group is of the view that the principle of equality before the law has been breached with regard to Mr. Bagayamukwe Tadji, in violation of article 26 of the Covenant and article 1 of the Universal Declaration of Human Rights. This breach leads to a finding in favour of the source in respect of category V.

32. In addition, the Working Group notes that Mr. Bagayamukwe Tadji has been diagnosed with cancer for which treatment is not available in the Democratic Republic of the Congo and therefore requires his transfer to a foreign hospital. Yet, the authorities have opposed his transfer, so Mr. Bagayamukwe Tadji is in a military hospital on Kokolo base in Kinshasa, where he is not receiving the appropriate care for his condition. The Working Group is of the opinion that the refusal to have him transferred is a violation of rules 25 and 27 of the Nelson Mandela Rules and runs contrary to the Working Group's opinion No. 35/2016 on the obligation to give special attention to persons with special health-care needs, which provides that the failure to take such measures would add gravity to the arbitrariness of the deprivation of liberty. Accordingly, it is apposite to draw the attention of the relevant special procedure to the matter.

33. Lastly, the Working Group considers it appropriate to refer the present case to the following special procedures: the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment and the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health.

Disposition

34. In the light of the foregoing, the Working Group renders the following opinion:

> The deprivation of liberty of Gustave Bagayamukwe Tadji, being in contravention of articles 1, 9 and 10 of the Universal Declaration of Human Rights and of articles 9, 14 and 26 of the International Covenant on Civil and Political Rights, is arbitrary and falls within categories I, III and V.

35. The Working Group requests the Government of the Democratic Republic of the Congo to take the steps necessary to remedy the situation of Gustave Bagayamukwe Tadji without delay and bring it into conformity with the relevant international norms, including those set out in the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights.

36. The Working Group considers that, taking into account all the circumstances of the case, the appropriate remedy would be to release Gustave Bagayamukwe Tadji immediately and accord him an enforceable right to reparation, including compensation and a guarantee of non-repetition, in accordance with international law, and to provide him with medical care as needed and appropriate for his condition.

37. The Working Group urges the Government to ensure a full and independent investigation of the circumstances surrounding the arbitrary deprivation of liberty of Mr. Bagayamukwe Tadji and to take appropriate measures against those responsible for the violation of his rights.

38. In accordance with paragraph 33 (a) of its methods of work, the Working Group refers the present case to the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment and to the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health.

Follow-up procedure

39. In accordance with paragraph 20 of its methods of work, the Working Group requests the source and the Government to provide it with information on action taken in follow-up to the recommendations made in the present opinion, including:

[5] See *O'Neill and Quinn v. Ireland* (CCPR/C/87/D/1314/2004), Human Rights Committee, para. 8.3.

(a) Whether Mr. Bagayamukwe Tadji has been released and, if so, on what date;

(b) Whether compensation or other reparations have been made to Mr. Bagayamukwe Tadji;

(c) Whether an investigation has been conducted into the violation of Mr. Bagayamukwe Tadji's rights and, if so, the outcome of the investigation;

(d) Whether any legislative amendments or changes in practice have been made to harmonize the laws and practices of the Democratic Republic of the Congo with its international obligations in line with the present opinion;

(e) Whether any other action has been taken to implement the present opinion.

40. The Government is invited to inform the Working Group of any difficulties it may have encountered in implementing the recommendations made in the present opinion and whether further technical assistance is required, for example, through a visit by the Working Group.

41. The Working Group requests the source and the Government to provide the above information within six months of the date of the transmission of the present opinion. However, the Working Group reserves the right to take its own action in follow-up to the opinion if new concerns in relation to the case are brought to its attention. Such action would enable the Working Group to inform the Human Rights Council of progress made in implementing its recommendations, as well as any failure to take action.

42. The Government should disseminate through all available means the present opinion among all stakeholders.

43. The Working Group recalls that the Human Rights Council has encouraged all States to cooperate with the Working Group and requested them to take account of its views and, where necessary, to take appropriate steps to remedy the situation of persons arbitrarily deprived of their liberty, and to inform the Working Group of the steps they have taken.[6]

[*Adopted on 23 April 2018*]

[6] See Human Rights Council resolution 33/30, paras. 3 and 7.